QUESTIONS PRESENTED

1. Relying on information provided by a fictitious informant, Minneapolis police officers directed Respondent's arrest in a dwelling where he temporarily resided. Police officers did not attempt to obtain an arrest warrant before storming the home. Prior to his arrest, Respondent was given permission to stay indefinitely at this dwelling by its residents, had no immediate intention of leaving the premises, received guests at the home and, if he chose, had the right to exclude persons from the dwelling. Under these circumstances, did Respondent have a reasonable expectation of privacy in his temporary residence sufficient to enable him to challenge his warrantless arrest under the Fourth and Fourteenth Amendments to the United States Constitution?

2. On Sunday, July 19, 1987, Minneapolis police received information from a fictitious informant implicating Respondent in a robbery and murder which occurred the previous day. Minneapolis police officers took no steps to identify the informant, nor did they attempt to contact the persons claimed by the fictitious informant to have specific knowledge of Respondent's claimed involvement in the offense. Those individuals later testified at a pre-trial hearing that they had no information regarding the July 18, 1987 offense nor were they even acquainted with Respondent. Although, on Saturday, July 18, 1987, other police officers needed only two and one-half hours to obtain a search warrant for Respondent's vehicle, Minneapolis police officers made no effort to secure an arrest warrant on July 19, 1987. The investigating officer testified at a pre-trial hearing that he did not do so because he did not wish to disturb local prosecutors during their leisure time. Although the July 18, 1987 offense did involve a violent crime, the murder weapon was recovered at the scene, police officers had no reason to believe that Respondent was armed or that his presence was endangering the residents of the home where he temporarily resided. The police were aware that Respondent was staying at this dwelling with the explicit consent of the building's tenants. There was no danger that delay in arresting

Respondent would lead to the destruction of evidence; although a delay would have permitted the police to investigate the credibility of the fictitious tipster's information. Under these circumstances, do any exigent circumstances exist justifying the subsequent warrantless storming of Respondent's residence by police officers bearing shotguns and drawn revolvers?

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STATEMENT

On July 18, 1987 a lone gunman entered a service station in Minneapolis, Minnesota (RHT. 48-60).[1] During the course of an armed robbery, this person shot station manager Roger Reinhardt (T. 30). Mr. Reinhardt later died as a result of this gunshot wound (T. 217).

Immediately after the gunman fled the scene, the robbery and shooting were reported to law enforcement officials. Minneapolis police dispatchers summoned police units to the service station and broadcast information describing the robbery, shooting, and suspect's physical appearance. (RHT. 48, 60). Two Minneapolis police officers, Officers Grabowski and Pihl, heard this report (RHT. 48, 60, T. 149). Officer Pihl believed the single suspect's general physical description and behavior matched that of Joseph Ecker, a suspect in other recent armed robberies (RHT. 60-61, T. 150). The officers traveled to Mr. Ecker's home at 2420 Polk Avenue N.E. (RHT. 60, T. 150).[2]

As the officers waited in an alleyway alongside the home, a brown Oldsmobile approached their squad car (RHT. 10, 64, T. 153). Officer Pihl immediately exited the squad car, drew his service revolver, and pointed it at the

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[1] "RHT" refers to the transcript of the pretrial suppression hearing conducted pursuant to Minnesota Rule of Criminal Procedure 11.02. This procedure is generally mandated by *State ex rel. Rasmussen* v. *Tahash*, 272 Minn. 539 141 N.W.2d 3 (1965). Consequently, this hearing is labeled a "Rasmussen" hearing and transcript references will be abbreviated "RHT" in this brief. "T" refers to the trial transcript.

[2] When officer Pihl came on duty at approximately 11:00 P.M. on July 17, 1987, he was presented with a "flyer" describing the previous robberies which identified Mr. Ecker as the sole suspect in those offenses (RHT. 62). This document listed Mr. Ecker's address as 2420 Polk Avenue N.E., Minneapolis, MN.

driver of the brown automobile (RHT. 11, 65, T. 154, 174).[3] Officer Grabowski reached into the rear of the police vehicle and began to remove a pump action shotgun (RHT. 11, T. 174). The brown automobile began backing away from the police car, turned in a "T portion" of the alleyway and proceeded "rapidly" northbound down the alleyway in apparent flight (RHT. 11, 66, 78, T. 154). Officers Pihl and Grabowski re-entered their patrol vehicle and began pursuing the brown Oldsmobile (RHT, 11, 65, 66). The driver lost control of the automobile as he attempted to exit the alleyway (RHT. 12, 16, 68, T. 155). As Officers Pihl and Grabowski approached the area, two individuals exited the Oldsmobile and fled on foot (RHT. 14, 69, T. 155). Officers Pihl and Grabowski attempted to chase these persons on foot, but quickly lost sight of each (RHT. 16-17, 69-71, T. 159). Within a few moments, other Minneapolis police officers arrived at the scene. The officers entered the house at 2420 Polk Avenue N.E. and emerged, in a few minutes, with Joseph Ecker in custody (RHT. 17-18, 72, T. 165). Mr. Ecker was later positively identified as the gunman who robbed the service station (T. 61, 86). Respondent's picture did not appear in the photographic lineup used to obtain Ecker's identification (T. 96).

Minneapolis police detective Robert R. Nelson arrived at 2420 Polk Avenue at approximately 6:15 A.M. (RHT. 98). Detective Nelson conducted a brief examination of the Oldsmobile and removed a Certificate of Title from the automobile. This Certificate identified the automobile's owner as Keith Jacobson (RHT. 99, T. 263-264). Detective Nelson also removed a letter from the vehicle. That letter was addressed to "Roger R. Olson" (RHT. 106, T. 225). It

[3] Both Officers Grabowski and Pihl testified that they only observed one individual inside the vehicle at this time (RHT. 10).

concerned an insurance claim from May, 1987 (T. 225). Detective Nelson then returned to 2420 Polk Avenue N.E. where he had separate conversations with Mr. Ecker and Dawn Corr, who was present in the house at the time Mr. Ecker was arrested (RHT. 102, 109). Neither individual identified Respondent as the driver or the passenger in the automobile which fled from Officers Pihl and Grabowski (RHT. 102, 109). Detective Nelson then attempted to locate automobile's registered owner, Keith Jacobson, without success (RHT. 104, T. 226). Detective Nelson did not issue arrest orders for either Mr. Olson or Mr. Jacobson (RHT. 104, 131).

Detective Nelson later returned to his office and related his investigation and observations to Minneapolis police detective Michael Sauro. Detective Sauro promptly secured a search warrant for the Oldsmobile and the home at 2420 Polk Avenue N.E. (RHT. 87). Although this was a Saturday morning, Detective Sauro was able to obtain the search warrant within two and one-half hours (RHT. 87-88). Detective Sauro subsequently seized a variety of materials from the home and automobile. The only item found in the automobile which bore any connection with Respondent was a videotape rental slip dated July 16, 1987 (RHT. 85, 93, T. 367, 369).[4] When Detective Sauro

[4] In its Brief, the prosecution asserts a variety of documents were found in the vehicle linking Respondent . . . to the car". The prosecution's Brief also notes that "a pellet gun . . . a knife, a knife sheath and two empty shoulder holsters for handguns . . ." were also found in the vehicle. In reality, although the prosecution introduced a bounty of goods seized from the vehicle, the items bore no indication of ownership. Detective Sauro admitted that the shoulder holsters did not bear Mr. Olson's name or initials (T. 372) and that at least one of the holsters found in the trunk bore salt stains suggesting it had been there for some time—long before Respondent's purchase of the vehicle (T. 371).

executed the search warrant at 2420 Polk Avenue, he too found Dawn Corr present (RHT. 88). He interviewed Ms. Corr who stated that a number of people were with Mr. Ecker the previous evening (RHT. 89). Respondent was not included in that list (RHT. 89).

The following day, July 19, 1987, a woman identifying herself as "Diana Murphy" telephoned Minneapolis police detective James DeConcini and, for the first time, made direct accusations against Respondent. This informant apparently told officers that "a guy named Rob" was staying with "LouAnn" and "Julie" at 2406 Fillmore N.E. and had told someone named "Marie" that he was one of the men who had fled from the police the preceding day (RHT. 113-114). Detective DeConcini was not familiar with the informant and took no steps to confirm her identify (RHT. 121, 123). Detective DeConcini conceded that he had 1986-1987 telephone directories available to him on July 19, 1987 but simply did not bother employing them to confirm the informant's identity (RHT. 123). Detective DeConcini admitted that if he had made this minimum effort he would have discovered that the name provided to him by this informant was, in fact, fictitious (RHT. 124). Detective DeConcini never spoke with "Maria", Julie or LouAnn Bergstrom to confirm the information provided by "Diana Murphy" (RHT. 122-125). He did, however, request Minneapolis police officers to travel to 2406 Fillmore Avenue N.E. to "locate Julie or LouAnn at that address and have one or both of those parties call me to verify the information given to me by Ms. Murphy" (RHT. 114).[5]

[5] Interestingly, another witness, Officer VonLehe, contradicted Detective DeConcini's version of these events and stated that when Minneapolis police officers initially went to 2406 Fillmore on July 19, 1987, it was, at Detective DeConcini's instruction, for the express purpose of arresting Mr. Olson, not to get corroborating information (RHT. 142).

When officers first visited the home at 2406 Fillmore N.E., they discovered it was a duplex and that LouAnn and Julie Bergstrom resided in the upper unit. Neither Julie Bergstrom nor her mother, LouAnn, were home and officers spoke with the downstairs resident, Helen Niederhoffer (RHT. 114). Ms. Niederhoffer stated that a "party known to her as Rob Olson had been staying upstairs . . ." (RHT. 114). She agreed to telephone police when Mr. Olson returned (RHT. 115). Ms. Niederhoffer added that she was not privy to any conversation with Respondent regarding his alleged involvement in the July 18, 1987 robbery (RHT. 125).

Ms. Niederhoffer telephoned Detective DeConcini at approximately 2:30 P.M. on July 19, 1987 and advised him that Mr. Olson had returned to the home at 2406 Fillmore (RHT. 137). Detective DeConcini then instructed Minneapolis police officers to surround the home and arrest Mr. Olson (RHT. 136-137). Detective DeConcini made no effort to obtain an arrest warrant prior to issuing this instruction (RHT. 127). Even though Detective Sauro had been able to procure a search warrant within two and one-half hours on the proceeding day, Detective DeConcini stated that it never occurred to him to obtain an arrest warrant and that he had never attempted to secure an arrest warrant on a weekend during his twenty years as a Minneapolis police officer (RHT. 129-130). Detective DeConcini added that he was also reluctant to disturb local prosecutors on Saturday or Sunday and disrupt their leisure time (RHT. 116).

Acting at Detective DeConcini's direction, Minneapolis police officers entered the Bergstrom home and arrested Mr. Olson (RHT. 139).[6] When entering the home these

[6] Respondent was arrested in an upstairs closet (T. 414). He did not threaten officers or resist arrest (T. 414).

officers did so with drawn revolvers and shotguns (RHT. 185-186, T. 542, 414). They did not seek consent of any occupant or resident before storming the building (RHT. 54, 145, 155, 198, 219, T. 413). Following Respondent's arrest, Minneapolis police officers transported Mr. Olson, LouAnn Bergstrom, Julie Bergstrom, and others seized at the premises to the Minneapolis Police Department Homicide office (RHT. 154, 165-166). While in custody, Respondent provided a statement to Sgt. Steven Sawyer, in which he admitted driving the brown Oldsmobile on July 18, 1987, but denied any involvement in the offense. Respondent stated that he was unaware of Mr. Ecker's intentions and was an innocent dupe (T. 389-396).

On August 11, 1987, the Hennepin County Minnesota Grand Jury indicted both Respondent and Joseph Ecker on charges of first degree felony murder contrary to Minnesota Statutes Section 609.185(3), aggravated robbery in violation of Minnesota Statutes Section 609.245, and second degree assault under Minnesota Statutes Section 609.222. At a pre-trail hearing Respondent timely moved to suppress his post-arrest statement on the grounds that his warrantless arrest violated the Fourth and Fourteenth Amendments of the United States Constitution. Respondent contended that the arrest was made without probable cause, that Respondent had a legitimate expectation of privacy in his temporary residence. Consequently, Respondent contended that his warrantless arrest directly contravened the principles set forth by this Court in *Payton* v. *New York*, 445 U.S. 573 (1980). The State replied that it could rely on its fictitious informant to create probable cause and that Respondent lacked "standing" to raise the constitutional issues related to the invasion of the home at 2406 Fillmore. The State also asserted that even if Respondent could raise this claim, exigent circumstances justified the warrantless arrest.

The testimony produced at the pre-trail hearing unequivocally demonstrated that Respondent was an authorized guest at this home, intended to stay there indefinitely, and had the tenant's permission to do so. In addition, Mr. Olson kept a change of clothes at the premises and had the right to allow or refuse visitor's entry. (RHT. 184, 192, 198, 217, 220). In particular, Mr. Olson testified:

> Q. Did you intend to continue staying at that address?
>
> A. Yes.
>
> Q. Did you have any other place to stay?
>
> A. No, I did not.
>
> Q. Were you ever asked to leave by the Bergstrom's?
>
> A. No, I was not.
>
> Q. . . . When you talked to your friends, if you told them to meet you some place, where would you tell them to meet you?
>
> A. I told them to meet me at that address.
>
> Q. If you told them to call you on the telephone, what number would you give them?
>
> A. Julie's number (RHT. 217-218).

The Trial Court rejected each of Respondent's claims. It rebuffed Respondent's probable cause attacks by concluding "the information provided by Diana Murphy could properly be considered by Sgt. DeConcini for purposes of establishing probable cause even though the true identity of Diana Murphy was, and remains, unknown." The Court refused to consider Respondent's other challenge by concluding that he had no reasonable expectation of privacy in the dwelling located at 2406 Fillmore Avenue N.E.

Interestingly, the Court based this determination, at least in part, on its conclusion that the Respondent was "a fugitive from a criminal investigation . . . therefore . . . any expectation of privacy the Defendant may have had was unreasonable."[7]

On February 11, 1988, Respondent was convicted of one count of first degree felony murder, three counts of armed robbery, and three counts of aggravated assault. The jury acquitted Respondent of one count of first degree felony murder.[8] On March 29, 1988 Respondent appealed his conviction to the Minnesota Supreme Court. Respondent's Appeal alleged numerous errors warranting reversal of his conviction. The Minnesota Supreme Court concluded that Respondent did possess a legitimate expectation of privacy in the dwelling at 2406 Fillmore and that his warrantless arrest directly contravened the Fourth and Fourteenth Amendments to the United States Constitution. Accordingly, the Minnesota

[7] The Trial Court's conclusion that Respondent had no expectation of privacy because he was the subject of a criminal investigation is absolutely insupportable. At the time Respondent began his stay at the Bergstrom home, he was not sought by police. Mr. Olson's arrest was not directed until after he began staying at the Bergstrom home. Moreover, even if literally true, the fact that an individual is the subject of a criminal investigation does not strip him or her of an expectation of privacy in certain places. In every instance where a Court has concluded that a warrantless arrest was unjustified, the individual arrested was the subject of a criminal investigation. If the person asserting a Fourth Amendment right was not the subject of a criminal investigation, he or she simply would not have been arrested. Holding that anyone who is the subject of a criminal investigation is bereft of any expectation of privacy in his or her dwelling will, by definition, emasculate the Fourth Amendment.

[8] The jury convicted Respondent of violating Minnesota Statutes Section 609.185(3) but acquitted him of a companion charge alleging a violation of Minnesota Statutes Section 609.185(1).

Supreme Court reversed Respondent's conviction and remanded this case for a new trial. The State subsequently filed a Petition for Rehearing which was denied by the Minnesota Supreme Court on March 28, 1989 (J.A. 27). Certiorari was granted by this Court on October 2, 1989.

SUMMARY OF ARGUMENT

1. Legitimate Expectation of Privacy.

The Minnesota Supreme Court properly held that Respondent had a reasonable expectation of privacy in the dwelling where he was arrested sufficient to warrant invocation of his Fourth Amendment right to be free from unreasonable search and seizure. The Minnesota Supreme Court's decision was well grounded in fact and supported by objective criteria. At the time of his arrest, Respondent was temporarily residing with LouAnn Bergstrom and her daughter, Julie, at 2406 Fillmore, Minneapolis, Minnesota. Respondent: (1) had the owner's permission to stay at the home, (2) had stayed there since the July 18, 1987 robbery, (3) intended to stay for an indefinite period, (4) kept a change of clothes at the premises, (5) had the express, albeit limited, authority to admit or refuse guests. (J.A. 21). Under these circumstances, the Minnesota Supreme Court's decision is consistent with this Court's determination in *Jones* v. *United States* as subsequently limited by *Rakas* v. *Illinois*. Petitioner's challenge to the Minnesota Supreme Court's decision can succeed only if this Court is willing to expressly overrule *Jones* v. *United States*.

2. Exigent Circumstances.

As established by this Court's earlier decisions in *Payton* v. *New York* and *Welsh* v. *Wisconsin*, Respondent's warrantless arrest is presumptively unlawful. It can

only be sanctioned if accompanied by an exigent circumstance. Petitioner bears a heavy burden in establishing an urgent need justifying Respondent's warrantless arrest. Petitioner has failed to meet this obligation. Petitioner has not demonstrated that procuring a warrant would have delayed Respondent's arrest, nor can it do so. The investigating officer acknowledged that, in Minnesota, an arrest warrant can generally be procured within a few hours. That officer, however, testified that in his twenty years of police experience he had never before sought a warrant during a weekend. Because other police officers were able to secure a search warrant in this case the previous day, Saturday, in less than three hours, it can be presumed that the warrant process in Minnesota moves with speed and precision. For this reason alone, the Minnesota Supreme Court properly determined that no exigent circumstances justified dispensing with the warrant requirement. Even if a warrant would have delayed Respondent's arrest, the State has not been able to articulate any basis for believing that the delay would endanger the police, Respondent, or the community. Each supposed "exigency" cited by Petitioner is, on examination, baseless speculation. Even if an exigency did exist, it was created through the conscious efforts of Minneapolis police officers and cannot be used to buttress their arrest decision. For these reasons, the Minnesota Supreme Court properly applied the *Dorman* analysis in determining that the police had failed to establish any exigency justifying Mr. Olson's warrantless seizure. The *Dorman* analysis is a useable framework and affords reasonable predictability. The test of exigency advocated by Petitioner and the Solicitor General will, in application, emasculate this Court's holding in *Payton* v. *New York* by making every felony arrest an emergency.

ARGUMENT

I. The Minnesota Supreme Court Properly Concluded That The Warrantless Storming Of Respondent's Temporary Residence By Police Officers Transgressed Respondent's Fourth Amendment Rights.

In its unanimous decision the Minnesota Supreme Court concluded that Respondent held a legitimate expectation of privacy in his temporary dwelling sufficient to permit invocation of Fourth and Fourteenth Amendment safeguards. That tribunal based its determination, in part, on the factual similarity between this proceeding and *Jones* v. *United States*, 362 U.S. 257 (1960). Simultaneously, the Minnesota Supreme Court acknowledged that *Rakas* v. *Illinois*[9] limited the scope of this Court's earlier decision but commented that *Rakas* expressly reaffirmed the factual holding of *Jones* (J.A. 21).

Petitioner argues that this decision will "greatly enlarge the class of persons who may invoke the exclusionary rule . . ." and "drastically [shift] the delicate balance between privacy rights and effective law enforcement . . ." (Petitioner's Brief, p. 13).[10] This claim dramatically overstates the effect of the lower Court's opinion. In reality, the Minnesota Supreme Court's decision simply reminds police authorities of their fundamental obligation to make arrests only within the parameters of the Fourth Amendment's warrant requirement.[11]

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[9] 439 U.S. 128 (1978)

[10] Hereafter, Petitioner's Brief will be cited, understandably, as "Petitioner's Brief." The separate Amicus Briefs prepared by several law enforcement organizations and the Solicitor General will be referred to as "Amicus Brief" and "Solicitor General's Brief" respectively.

[11] Petitioner contends that the Minnesota Supreme Court's decision "contradicts the common sense understanding of home that

Relying on uncorroborated and uninvestigated assertions from a fictitious informer, police directed Respondent's arrest. They did so without seeking an arrest warrant. The investigating officer, Detective DeConcini, testified at the pretrial suppression hearing that in nearly two decades as a police officer he had never attempted to obtain an arrest warrant during a weekend (RHT. 130). Detective DeConcini added that one consideration underpinning his refusal to do so was his reluctance to disturb local prosecutors on Saturday or Sunday. (RHT. 116). Understandably, the Minnesota Supreme Court did not view these events favorably. Its decision does not drastically shift any jurisprudential balance between individual privacy and police power. Rather, the Minnesota Supreme Court's decision appropriately reproached police officers for blithely ignoring long standing constitutional safeguards. Police zeal to make a prompt arrest for a serious crime is laudable. However, seven members of the Minnesota Supreme Court recognized that this well-intentioned desire cannot excuse the nonconsentual

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citizens and police officers alike share. This assertion itself is questionable. Mr. Olson's arrest was effected at his residence—albeit a temporary one. Police and Courts alike must recognize that not every citizen enjoys a comfortable lifestyle featuring long-term stability. For much of society, residence is surprisingly transitory. The lay person, unschooled in the nuances of criminal procedural rights, is generally aware only that police generally must secure warrants before undertaking a search or seizure. Conceivably "public perception" of the Fourth Amendment's scope is more broadly conceived by society as a body than by judicial officers. For this reason, a number of commentators have suggested that the focal point for analysis is not on the public's "common sense understanding" or current expectations, but on what privacy expectations citizens can demand society honor. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 Geo. Wash. L. Rev. 529, 536 (1978), Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Calf. L. Rev. 1593, 1611 (1987).

storming of Respondent's dwelling by armed officers who made no pretense of first seeking judicial approval.

A. The Minnesota Supreme Court Correctly Determined That Respondent Has A Reasonable Expectation Of Privacy In His Temporary Dwelling Sufficient To Permit Invocation Of Fourth And Fourteenth Amendment Safeguards.

As its core, the Fourth Amendment guarantees an individual's right to be free from unreasonable searches and seizures performed by police authorities. *Silverman* v. *United States*, 365 U.S. 505 (1961). This safeguard has been made applicable to state action by virtue of the Fourth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Admittedly Fourth Amendment rights are personal in nature and may not vicariously asserted. *Brown* v. *United States*, 411 U.S. 223, 230 (1973). For that reason Respondent's ability to raise these constitutional claims requires that a right personal to him be transgressed. Traditionally, Courts have viewed this concept as "standing" to challenge a search or seizure. In the continuing evolution of constitutional law, the catch phrase "standing" is no longer entirely accurate. Beginning with *Katz* v. *United States*, analysis of the Fourth Amendment's scope has focussed on an individual's privacy expectations. Commenting that "The Fourth Amendment protects people, not places" this Court held that whenever a person possesses a reasonable expectation of privacy in a particular context he can avail himself of the protection granted by the Fourth Amendment. 389 U.S. 347, 351 (1967).

Respondent concedes that he did not have a formal tenancy interest in the residence (RHT. 189). However, he was in the home with the knowledge, consent and permission of its tenants (RHT. 184, 194-195). LouAnn Bergstrom testified that Respondent had the right to allow visitors into the premises or to refuse them entry

(RHT. 192).[12] Julie Bergstrom testified that Mr. Olson had permission to reside at the home for an indefinite period (RHT. 198). Respondent confirmed this statement (RHT. 220). Although Mr. Olson did not possess any furniture at the residence, he did have changes of clothes with him and intended to stay at this home for the indefinite future (RHT. 220).

Nonetheless, Petitioner claims that the Minnesota Supreme Court erred in concluding that Respondent had a legitimate expectation of privacy in the dwelling where he was arrested. The State challenges the factual foundation of the Minnesota Supreme Court's decision and parades a litany of items earlier accepted by the trial Court to strip away Respondent's right to challenge his warrantless arrest. (Petitioner's Brief, p. 16). These arguments were considered, and rejected, by the Minnesota Supreme Court, which noted:

> The trial court found that Olson had no reasonable expectation of privacy in the 2406 Fillmore residence. The court said Olson was not a tenant; that he had no possessions at the duplex except for a change of clothes; and that he slept on the floor. This ruling ignores, however, the fact that Olson had permission to stay at 2406 Fillmore for some indefinite period, and that LouAnn Bergstrom testified Olson had the right to allow or refuse visitors' entry.

(J.A. 21).

Petitioner continues to question the validity of the Minnesota Supreme Court's conclusion (Petitioner's Brief, p.

[12] Respondent concedes this right was not unqualified. In essence, the Bergstrom's granted this authority to Respondent as a right attendant to his indeterminate occupancy of the premises. That privilege, obviously, remained subject to his host family's primary possessory claim.

16), see also Solicitor General's Brief, p. 18). The parties' testimony, however, reinforces the Minnesota Supreme Court's determination that Olson possessed a societally recognized privacy right in the dwelling where he was arrested. Mr. Olson testified that he had no other address, that he was given permission to stay at the premises for an indefinite period by the tenants, he had no intention of departing, and he received friends and visitors at that address and would instruct them to meet him at this particular dwelling. (RHT. 217-218). LouAnn Bergstrom testified that Respondent could admit or deny visitors' entry (RHT. 192). Julie Bergstrom testified that Mr. Olson initially asked her permission to stay at the residence. She stated that she agreed to his request and that he had permission to continue residing at her home for an indefinite period (T. 198).

Nonetheless, Petitioner contends that Respondent's connection with the dwelling is too tenuous to give rise to broadly recognized privacy expectations. Petitioner and the Amicus parties allege that Respondent must establish an ownership interest, a quasi property right, or evidence exclusive control of the dwelling before these privacy expectations can be legitimized (Petitioner's Brief, p. 20, Solicitor General's Brief, pp. 11, 19).

Although the factors mentioned by Petitioner are relevant to an inquiry into the validity of Respondent's privacy expectation, they are not, obviously, wholly determinative. *Rawlings* v. *Kentucky*, 448 U.S. 98, 105 (1980). Neither an ownership interest nor exclusive dominion over a given area is a prerequisite for "standing" under the Fourth Amendment. *Katz* v. *United States*, 389 U.S. at 353. See also *Warden* v. *Hayden*, 387 U.S. 294 (1966).

This Court has explicitly held that an individual may have a privacy expectation even while present as an

authorized guest in another's dwelling. *Jones* v. *United States*, 362 U.S. 257, 265-266 (1960). The *Jones* decision determined that "anyone legitimately on the premises where a search occurs may challenge its legality . . ." Id at 267. In *Rakas* v. *Illinois*, the Court narrowed its prior holding in *Jones*. Justice Rehnquist, in his opinion, was however, careful to note:

> We do not question that conclusion in *Jones* that the defendant in that case suffered a violation of his personal Fourth Amendment rights if the search in question was unlawful . . . We think that *Jones* on its facts merely stands for the unremarkable proposition that *a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable government intrusion into that place.* (Emphasis supplied).

439 U.S. 128, 142-143 (1978).

The Minnesota Supreme Court's February 24, 1989 decision plainly and straightforwardly applied the guidelines set forth in this Court's decisions in *Jones* and *Rakas*. The Minnesota Supreme Court construed *Rakas* as rejecting "the notion that anyone legitimately in a dwelling automatically has standing to challenge an illegal search . . ." but added ". . . this did not mean that a guest never has standing . . ." and "although the *Rakas* Court subsequently qualified the rationale of *Jones*, it explicitly reaffirmed the factual holding in that case . . ." (J.A. 21). Because the Minnesota Supreme Court found the factual setting between this action and Jones "quite similar" it reasonably concluded that Mr. Olson possessed a legitimate expectation of privacy in the dwelling at 2406 Fillmore.

D. The Minnesota Supreme Court Properly Applied Prior Decisions Of This Court In Concluding That Respondent's Personal Fourth Amendment Rights Were Violated By His Warrantless Arrest.

1. Respondent's Assertion Of His Fourth Amendment Right To Be Free From Unreasonable Search And Seizure Is Not Dependent Upon The Existence Of A Property Interest In His Temporary Dwelling.

Petitioner emphasizes Respondent's lack of a proprietary interest in the premises at 2406 Fillmore as proof that he did not possess a reasonable expectation of privacy in that dwelling. Similarly, the Solicitor General argues that a person who does not have a "recognized legal interest property" or an interest which "enjoys the distinguishing feature and chief quality of . . . property rights . . ." cannot invoke the safeguards contained in the Fourth Amendment. (Solicitor General's Brief, p. 11).

This characterization broadly misstates the focus of this Court's earlier decisions. Admittedly, a footnote in *Rakas* contains this Court's comment:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law. . .

439 U.S. at 143, n. 12. However, that footnote goes on to add:

> Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common law interest in real or personal property or on the invasion of such an interest. These ideas were rejected both in *Jones* . . . and *Katz*. . .

Id. at 143, n. 12.

Indeed, in *Rakas* this Court was careful to emphasize:

> . . . We adhere to the view expressed in *Jones* and echoed in later cases that arcane distinctions developed between property and tort law, between guests, licensees, invitees and the like, ought not to control. . .

Id. at 143.

The course set by this Court in *Jones*, *Katz*, and *Rakas* is consistent with the historical context underlying creation of the Fourth Amendment. The Solicitor General contends: "the first clause of the Fourth Amendment makes clear that the amendment focus principally on the protection of interest in property." (Solicitor General's Brief, p. 10). From this it argues that recognized property rights or privileges inherently tied to property ownership are prerequisites to valid privacy expectations. This statement grievously misstates the historical context underpinning creation of the Fourth Amendment. The Fourth Amendment was not so much a desire to protect property interests as an effort to extinguish general warrants.

Since organized local police forces were not created until approximately 1844, the framers of the Constitution simply did not envision a warrantless search or arrest. Prior to the enactment of the Constitution *all* arrests, wherever accomplished, required a warrant of some type. The purpose of the Fourth Amendment is simply to assure that any warrant issued be based on probable cause. As one commentator noted:

> . . . The searches with which the founding fathers were familiar were searches conducted by private citizens. These searches required a writ of some sort. Consequently, a warrantless search, reasonable or otherwise, would not have been in the contemplation of the drafters of the Fourth Amendment. It appears, then, that the prohibition against unreasonable searches is coextensive with the prohibition against

> unsupported warrants for it is unlikely that the drafters envisioned a search which could be both reasonable and without a warrant. . .
>
> Given the historical period which was the context for a national revolution and the spirit in which the Fourth Amendment was drafted, the Fourth Amendment to the Constitution did not admit of the possibility of arrest or search *without* a warrant. (Emphasis in original).

Grayson, *The Warrant Clause in Historical Context*, 14 Am. J. Crim. Law, 107, 114 (1987). This historical context was apparently accepted by Justice Jackson in *Harris* v. *United States*, 331 U.S. 145, 196 (1946), (dissenting).[13]

By diverting focus from mechanistic property concepts as a focal point for Fourth Amendment analysis, this Court has, in fact, reinvigorated the framers' original intent. The simple fact that Respondent's control over the premises was limited, or shared with others, does not necessarily forestall invocation of his Fourth Amendment rights. In *Recznik* v. *City of Lorain*, this Court held that privacy expectations are not waived merely because a number of people gather together in a private residence. 393 U.S. 166, 169 (1968) (per Curiam). Indeed, many encounters with police authorities are made in shared surroundings. As one commentator noted ". . . where the claimant is part of a sufficiently small and intimate group that shares a place [he or] she has an expectation of privacy there that should be recognized." Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Calif. L. Rev. at 1618.

Moreover, this is fully consistent with recent decisions of this Court. Petitioners and the Amicus parties all claim

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[13] This historical context is not universally accepted as Justice Stevens explained in *Payton* v. *New York*, 445 U.S. at 592-598.

that Respondent cannot claim legitimate expectation of privacy if he does not have complete control and dominion over the premises coupled with the right to exclude *all* others from the dwelling. (See Petitioner's Brief, p. 17, Solicitor General's Brief, p. 19, Amicus Brief, p. 7). From a common sense prospective, this notion is nonsensical. It would, if literally applied, emasculate the Fourth Amendment. Virtually no one has untrammelled authority to exclude unwanted or undesired guests. Tenants in common and joint tenants must comply with one another's wishes. Roommates must acquiesce to the entry of their companion's guests, no matter how unwanted or undesirable. Certainly the fact that one chooses to live with others, and on occasion to be subordinate to their desires, does not mean that this individual forfeits any legitimate expectation of privacy in doing so. As this Court commended in *Katz* v. *United States:*

> . . .This effort to decide whether or not a given area viewed in the abstract is constitutionally protected reflects attention from the problem presented by this case. For the Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection (citations omitted) but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. at 351.

In *Rakas* this Court carefully drafted its opinion to preserve this concept. The State argues that *Rakas* affirmed the factual holding in *Jones* merely because "Jones had complete dominion and control over the apartment and could exclude others from it." Petitioner's Brief, p. 17, citing *Rakas*, 439 U.S. at 149). Somewhat disingenuously, the State chose to delete this Court's prefatory comment concerning the nature of Jones' control of the

premises. Justice Rehnquist characterized that authority as follows:

> *Except with respect to his friend*, Jones had complete dominion and control over the apartment and could exclude others from it (Emphasis supplied).

439 U.S. 128. Nothing in this Court's jurisprudence suggests that an individual must have absolute, or even primary control, over a given area before possessing a legitimate expectation of privacy in that place.[14] *Katz* v. *United States*, 389 U.S. at 351; *Rakas* v. *Illinois*, 439 U.S. at 149.

2. The Minnesota Supreme Court's Decision Can Be Reversed Only If This Court Is Willing To Overturn *Jones* v. *United States*.

The Minnesota Supreme Court explicitly based its decision on *Jones* v. *United States* (J. A. 21-22). Although this Court has narrowed its scope, that decision has never been overruled. Indeed, this Court was careful, in *Rakas* v. *Illinois*, to reaffirm the fact-based holding "that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable government intrusion into that place." 439 U.S. at 142.

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[14] One commentator has noted that many Fourth Amendment claims are "secondary" or "derivative" in nature. For example, in family or communal settings, the actual owner or tenant of the property may be considered a primary right-holder. Others residing in the property may have no formal ownership or tenancy interest, yet hold societally recognized privacy expectations based on the grant of authority from a primary right-holder. In determining the scope of the Defendant's recognized privacy expectation, the Court must depend "on fairly concrete facts about the relationship." Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 Calif. L. Rev. at 1619-1620.

The circumstances of *Jones* v. *United States*, as recited by this Court, bear a striking similarity to the present case. In *Jones:*

> On direct examination [Defendant] testified that the apartment belonged to a friend, Evans, who had given him the use of it, and a key, with which the Petitioner had admitted himself on the day of the arrest. On cross examination Petitioner testified that he had a suit and shirt at the apartment, that his home was elsewhere, that he paid nothing for the use of the apartment, that Evans had let him use it as a friend, that he slept there maybe a night and that at the time of the search Evans had been away in Philadelphia for about five days.

362 U.S. at 259.

Petitioner labors mightily, yet fruitlessly, to distinguish *Jones*. The only distinguishing characteristic cited by the State is that *Jones*, in contrast to Olson, possessed a key to the dwelling. Possession of a key, while certainly a factor in *Jones* is, in no fashion, crucial to its holding.[15] Suggesting that a guest in a dwelling possesses a reasonable expectation of privacy only if he or she has a key and control of the premises once again supplants

[15] Possession of a key was apparently only one factor considered by this Court in *Jones*. See *Jones* v. *United States*, 362 U.S. at 295, *Rakas* v. *Illinois*, 439 U.S. at 141. This is hardly surprising. The author of this brief employs a cleaning person who possesses keys to my dwelling. This individual is present but for a few hours each month. She receives no guests, telephone calls or messages at this address. She does not sleep there nor consume meals on the premises. Since she cleans the home alone during the work day, she also has "exclusive dominion" over the dwelling. Incredibly, under the State's analytical framework, this cleaning person may have a greater expectation of privacy than Respondent simply because she has a key to the premises. Giving possession of a key the primacy advocated by the State is simply nonsensical.

privacy expectations with mechanistic concepts. Yet Petitioner explicitly asks this Court to strip away Respondent's subjective privacy expectations merely because he did not have a key to the premises.

The factual similarity between *Jones* and this case are striking. Jones occupied the apartment of his friend after first obtaining consent. Olson occupied his friends' home with their consent (RHT. 182, 198) Jones had stayed at his friend's apartment "maybe a night". Olson stayed at the Bergstrom home for one to two days (RHT.216-218). Neither Olson nor Jones paid rent. Both Olson and Jones possessed clothes at their temporary dwelling but certainly not a full wardrobe (RHT. 220). While Olson professed his continuing intention to reside at the Bergstrom home for an indeterminate period, the record in *Jones* is silent regarding the planned duration of Jones' stay. Given his synergy the Minnesota Supreme Court had little choice but to follow *Jones* and grant Respondent "standing". Only by overturning that decision can this Court accomplish the end sought by Petitioner. In the past this Court has been loath to employ this extreme measure. *Welch* v. *Texas Department of Highways*, ___ U.S. ___, 107 S. Ct. 2941, 2948 (1987), *Thomas* v. *Washington Gas Light Company*, 448 U.S. 261, 272-273 (1980).

3. This Court Should Not Overrule *Jones* v. *United States* And Adopt The Artificial And Mechanistic Test Proposed By Petitioner.

Petitioner advocates this Court adopt a twelve-part test to determine whether a criminal defendant's subjective privacy expectation is one recognized by society (Petitioner's Brief, p. 21). The Amicus parties aligned with prosecuting authorities suggest a similar test (Ami-

cus Brief, p. 6).[16] Certainly some of the factors outlined by Petitioner relate to a criminal defendant's objective privacy expectation. For example, if the visitor had taken precautions to develop and maintain his privacy in the dwelling, that evidence is a subjective expectation of privacy. Similarly, if the visitor has some right to exclude others from the home, that right gives objective validity to the guest's subjective expectation.

However, the majority of the concerns outlined in Petitioner's formula have little to do with privacy notions.[17]

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[16] Interestingly, Petitioner argues that the much more streamlined *Dorman* guideposts are "impractical, inflexible and outdated" (Petitioner's Brief, p. 29). However, the State has no hesitancy in advocating adoption of its multi-faceted and mechanistic framework to gauge privacy expectations. The intrinsic inconsistency in the State's position is painfully clear. Apparently the State views the *Dorman* test as overly restrictive because it limits police authority to invade private areas. Accordingly, it wants to do away with *Dorman*. Similarly, Petitioner advocates imposition of a Byzantine and mechanical approach to "standing" because it believes this tactic will limit the number of persons able to raise Fourth Amendment challenges to a warrantless seizure.

[17] For example, Petitioner suggests that a visitor related by blood or marriage has a greater expectation of privacy than a non-relative guest. This supposition is questionable. A person present at the home of a distant relative for a brief time presumably has a lesser expectation of privacy than one present at the home of his best friend. Other "relevant factors" seem to be included for the singular purpose of limiting the number of Defendants able to raise Fourth Amendment claims. Petitioner suggests that a person receiving mail at the dwelling or having his name on the door possesses a greater expectation of privacy than an individual receiving his mail at a local post office. This factor will almost always weigh against a grant of "standing". Generally, persons receiving their mail at a particular address, or having their name posted on the door, assume permanent residence. Virtually all the remaining criteria the State seeks to employ concern attributes uniquely attributable to either owners or principal tenants. These criteria are unlikely to favor guests of any duration.

The factors listed by Petitioner are little more than a catalogue of many of mechanistic criteria. Many of Petitioner's considerations have been explicitly rejected by this Court as pertinent factors in determining an individual's legitimate privacy expectations. In particular, Petitioner advocates the Court consider an individual's property interest in the premises, receipt of mail, contribution to maintenance, and volume of clothing and other possessions present as applicable gauges. Presumably, the State believes these factors all weigh against Respondent. They also weighed against Jones. Yet, this Court explicitly affirmed Jones' right to contest a seizure at his friend's apartment, where he did not receive mail, where he had slept but a night, and at which he had but a single change of clothing. 362 U.S. at 265. Viewed in this light, Petitioner's analytical framework is best examined as a hidden attack on *Jones* v. *United States*. The purpose of this test is, by subterfuge, to strip away the remaining validity of this Court's earlier decision.

Petitioner hopes to accomplish this goal by replacing the analytical constructs of *Jones*, *Katz*, and *Rakas* with its mechanistic "checklist". In doing so, it directly challenges the rationale underpinning those decisions. In particular, Chief Justice Rehnquist noted:

> . . . capacity to claim the protection of the Fourth Amendment depends not on a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place (citations omitted). Viewed in this manner, the holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore can claim the protection of the Fourth Amendment with respect to government invasion of those premises, even though his interest in those premises might not have been a recognized property interest as common law.

Rakas v. *Illinois*, 439 U.S. at 143. Similarly, in *Jones* v. *United States*, this Court declared:

> We are persuaded that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions developed and refined by the common law in evolving the body of private property law which more than almost any other branch of law has been shaped by distinctions whose validity is largely historical . . . distinctions such as those between "lessee", "licensee", "invitee" and "guest" often only of gossamer strength ought not to be determinative in factioning procedures ultimately referable to constitutional safeguards.

362 U.S. at 265-266. Yet, that is precisely what the State suggests this Court do through the use of its twelve-part test.

Most importantly, this Court should categorically reject Petitioner's "checklist" concept because it is of marginal utility. This Court has emphasized that any guideposts intended to govern police behavior in search and seizure decisions must be workable for application by rank and file police officers. *Illinois* v. *Andreas*, 463 U.S. 765, 772 (1983). *New York* v. *Belton*, 453 U.S. 454, 458-460 (1981), *United States* v. *Ross*, 456 U.S. 798, 821 (1982). The multi-prong analysis advocated by Petitioner is, by contrast, byzantine, unfocused, and confusing. Many of the criteria advocated by the State, such as property rights, receipt of mail, possession of a key, contribution to household maintenance, and volume of goods or possessions present, will simply not be known to police officers who must make an immediate decision. Moreover, Petitioner's formula makes no effort to identify which criteria are more or less important than others. Consequently, police officers on the scene will receive little illumination or instruction from this checklist.

4. Privacy Expectations Must Generally Be Determined On A Case-By-Case Basis But, If This Court Believes Lower Courts Need Guidance In Making These Decisions Superior Alternative Criteria For Petitioner's Proposed Test Are Available.

The State asserts that this Court has failed to "set forth the factors which would help establish a legitimate expectation of privacy . . ." and that lower Courts . . . without guidance from this Court have reached inconsistent and sometimes incongruous results" (Petitioner's Brief, p. 20). In *Rakas* this Court recognized that privacy expectations must, of necessity, be analyzed on a case-by-case basis and consequently rejected a "bright line" rule. 439 U.S. at 144-148.[18] That determination is still valid. Because a Court in one jurisdiction suppresses evidence while another refuses to do so does not mean that the state of jurisprudence is a mine field of confusion. It merely means that lower Courts have accepted this Court's admonition to make suppression decisions on a case-by-case basis.

This does not imply that lower Courts apply vastly differing tests or standards to make that determination.

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[18] Indeed, in *Rakas*, this Court noted that there will always "be fine lines to be drawn in Fourth Amendment cases as in other areas of law . . ." and explicitly determined that "standing" determinations require individual analysis. 439 U.S. at 147. The "legitimately on the premises" standard enunciated in *Jones* v. *United States* was far more clear than the circuitous analytical framework proposed by Petitioner. Yet this Court rejected that more clearly articulated guide as "a phrase which at most has superficial clarity and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment." Id at 147. If this Court now wishes to reverse the path laid down in *Rakas* and supplant a "bright line" standard for individualized application of legitimized privacy expectation, then the "legitimately on the premises" test, however flawed, offers greater instruction to police officers.

Indeed, there is no doubt that lower Courts have readily adopted the general standard that an individual can raise a Fourth Amendment seizure challenge only when he or she has a legitimate expectation of privacy in a given case. See *United States* v. *Aguirre*, 839 F. 2d 854 (1st Cir. 1988), *United States* v. *Echegoyen*, 799 F. 2d 1271 (9th Cir. 1986), *United States* v. *Pollock*, 726 F. 2d 1456 (9th Cir. 1984), *State* v. *Reddick*, 207 Conn. 323, 541 A. 2d 1209 (1988). *People* v. *Smith*, 420 Mich. 1, 360 N.W.2d 841 (1984). In applying the general principal, lower Courts have used remarkably similar criteria. Trial Courts consider a guest's legitimate presence at the scene, the extent of the accused's actual use or occupancy of the premises, right to exclude others, the defendant's subjective expectation of privacy in the area, the nature and degree of the accused's freedom to utilize the property, and his relationship with the actual owner or tenant. See *United States* v. *McIntosh*, 845 F. 2d 466 (8th Cir. 1988), *United States* v. *Sangineto Miranda*, 859 F. 2d 1501 (6th Cir. 1988).

Standing alone, this framework certainly seems workable. However, if lower Courts need additional guidance, Respondent suggests this Court instruct them to apply the following criteria:

(1) Is the guest legitimately present at the scene?

(2) Has the accused been granted authority over the premises greater than that normally possessed by a casual visitor? For example, does the accused have any limited right to exclude unwanted intruders from the dwelling?

(3) Is there a fixed duration to the guest's stay? If so, what is the duration of his or her presence?

(4) Does the suspect have freedom to utilize the property or has he stayed there in the past? What is his relationship with the actual owner or tenant?

These factors are far more flexible than the mechanistic "checklist" concept advocated by Petitioner and also offer both lower Courts and police officers in the field guidelines more closely tied to expectations of privacy.

C. The Foundational Principles Underlying The Exclusionary Rule Support The Minnesota Supreme Court's Decision.

The Minnesota Supreme Court's unanimous opinion mandated suppression of evidence obtained as a result of Respondent's warrantless arrest. In urging this Court to strip away Mr. Olson's right to claim the protections granted by the Fourth Amendment, Petitioner again reminds this Court of the social cost attendant to the exclusionary rule—withholding evidence from the ultimate trier of fact (Petitioner's Brief, p. 14).

This is certainly a valid concern and should not be minimized. However, Petitioner's concentration on this issue conveniently overlooks the intertwined principles underlying the exclusionary rule.[19] Those precepts mandate its application here and favor the Minnesota Supreme Court's grant of "standing" to Respondent.

First, the exclusionary rule deters police misconduct by preventing the government from using the fruits of its illegal conduct against the person whose rights it violated. *Weeks* v. *United States*, 232 U.S. 383 (1914), *Mapp* v. *Ohio*, 367 U.S. 643 *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Obviously, the Minnesota Supreme Court's

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[19] As this Court acknowledged in *United States* v. *Leon*, concern over the impact of the exclusionary rule pertains to the "absolute" number of defendants released because of police illegality. The study cited by this Court in *Leon* suggests that an insubstantial percentage of arrestees are freed due to the invocation of the exclusionary rule. 468 U.S. 897, 907, n 6 (1982).

decision will reacquaint Minneapolis police officials with the commands of the Fourth Amendment. It will also effectively remind them of the penalty the prosecution and society must pay when the police refuse to heed its dictates.

Second, use of the exclusionary rule preserves judicial integrity in the criminal prosecution process. As this Court first explained in *Mapp* v. *Ohio:*

> . . . There is another consideration—the imperative of judicial integrity. The criminal goes free if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws or worse, its disregard of the charter of its own existence.

367 U.S. at 659.

The character of the police attack on Mr. Olson's temporary sanctuary lends paramount attention to this concern. Relying on uncorroborated and uninvestigated information from a fictitious informant, police directed Respondent's arrest. They did so without bothering to even attempt securing an arrest warrant. Officer DeConcini testified at the pretrial suppression hearing that he had never attempted to obtain an arrest warrant during the weekend (RHT. 130) and added that one consideration underpinning his refusal to do so was his reluctance to disturb local prosecutors on Saturday or Sunday (RHT. 116). The Minnesota Supreme Court's decision properly emphasized to police officers that they should be equally sensitive to the liberty interests of citizens. It also preserved judicial rectitude.

Reversing the Minnesota Supreme Court will, in effect, make the judiciary a motivating force sanctioning police

misconduct.[20] Justice Stevens recently highlighted this concern, commenting:

> It is, or course, true that the exclusionary rule exerts a high price—the loss of probative evidence of guilt. But that price is one the Courts have often been required to pay to serve important social goals. That price is also one the Fourth Amendment requires us to pay, assuming as we must that the framers intended that its strictures "should not be violated". For all such cases, as Justice Stewart has observed "the same extremely relevant evidence would have been obtained had the police officer complied with the commands of the Fourth Amendment in the first place. (Citation omitted)

United States v. *Leon*, 468 U.S. at 979 (Stevens, J., dissenting, and concurring in *Massachusetts* v. *Shepard*, 468 U.S. 981 (1982).

II. Respondent's Warrantless Arrest Was Not Justified By Exigent Circumstances.

Petitioner contends that, even if Respondent possessed a legitimate expectation of privacy in the dwelling where he was arrested an urgent need sanctioned his war-

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[20] On occasion this Court has suggested that suppression of evidence, in certain instances, may not be an appropriate vehicle to remedy of unlawful police conduct. For example, it can be argued that even if the prosecution were allowed to use the evidence obtained by Mr. Olson's arrest, that civil litigation can prove illegality. This argument, while facially convincing, reflects abstract notions and ignores practical reality. Juries are unlikely to punish officers for seeking out criminal suspects. Moreover, a series of procedural and substantive defenses have been engrafted onto civil rights claims. See *Malley* v. *Briggs*, 475 U.S. 335 (1986), *Davis* v. *Scherer*, 468 U.S. 183 (1984), *Graham* v. *Connor*, ____ U.S. ____, 104 L. Ed. 2d 1443 (1989). The net effect is to make civil recovery extraordinarily speculative, conjectural and burdensomely expensive.

rantless arrest. That claim was rejected by the Minnesota Supreme Court, which commented:

> While it is true that a grave crime was involved, it is also true that the suspect was known not to be the murderer, but thought to be the driver of the getaway car. Probable cause to believe the suspect was the driver depended, as we have seen, in large part on the reliability of an unknown informant. The police had already recovered the murder weapon. The suspect had not left town by bus, at least not yet, as the telephone tip had indicated, but had returned to the duplex where he had stayed the previous night. The police knew that LouAnn and Julie [Bergstrom] were with the suspect in the upstairs duplex with no suggestion of danger to them. . .
>
> We do not think the particular circumstances of this case amount to exigent circumstances. It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended. . .

The Minnesota Supreme Court added:

> At least by 2:00 P.M. the police had made plans for Olson's arrest at the dwelling where he was staying at such time as Olson might return. Nevertheless, in the hour that elapsed before any arrest could be made at the duplex, no effort was made to obtain an arrest warrant to enter the dwelling. We do not know if a warrant could have been obtained within that hour or within a relatively short time thereafter; on the other hand, the State has not suggested that a warrant could not have been obtained. We do know that a search warrant was obtained on Saturday, the day before, in two and one-half hours when the urgency to search an already impounded car was much less.

(J.A. 23-25). Given this scenario, the Minnesota Supreme Court concluded that Respondent's Fourth Amendment

rights were violated by his warrantless arrest. That determination should be affirmed.

A. Warrantless Arrests In Private Residences Are Presumptively Unlawful.

This Court has unequivocally held:

> In terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. *New York*, 445 U.S. 573, 590 (1980). Accordingly, Respondent's warrantless arrest inside a dwelling is presumptively unlawful. *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984). Petitioner has the responsibility of establishing that Respondent's arrest falls within one of the narrowly defined exceptions to this constitutional prohibition. In weighing that obligation, this Court has specifically declared that "police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or seizures." Id at 749-750.

B. Petitioner Has Failed To Meet Its Burden Of Demonstrating Any Exigency Justifying The Police Storming Of Respondent's Temporary Residence.

In this action the prosecution has sorely failed to voice any exigent condition which may sanction Mr. Olson's warrantless arrest. The emergency circumstances necessary to justify a warrantless arrest are generally those which gravely endanger the lives of the public or police officers. *United States* v. *Jones*, 635 F. 2d 1357 (8th Cir. 1980). This does not mean simply that a violent or dangerous crime has occurred. This Court has never comprehensively discussed the various emergency circumstances sanctioning a warrantless arrest. A number of

this Court's decisions make it plain that exigencies arise only in a handful of narrowly tailored instances. For example, hot pursuit of a fleeing felon, *United States* v. *Santana*, 427 U.S. 38 (1976); destruction of evidence, *Warden* v. *Hayden*, 387 U.S. 294, gunplay or danger of gunplay, *Michigan* v. *Tyler*, 436 U.S. 99 (1978).

1. Petitioner Has Not Explained Why Police Authorities Could Not Promptly Secure A Warrant For Respondent's Arrest Nor Any Public Danger Caused By Delaying Respondent's Arrest Until A Warrant Could Be Secured.

Petitioner has not yet explained why Detective DeConcini could not obtain a warrant for Respondent's arrest. Petitioner claims that obtaining an arrest warrant "takes substantial time" because the warrant "must be combined with a criminal complaint which requires the signature and approval of both the County Attorney and a Judge." The procedure is not nearly so burdensome as Petitioner leads this Court to believe. The "complaint" referred to by the prosecution is in fact compiled on a standardized form mandated by Minnesota Rule of Criminal Procedure 2.03. These complaints need not be extraordinarily lengthy. They must simply contain "sworn testimony that there is probable cause to believe that an offense has been committed and that the defendant committed it . . ." Minnesota Rule of Criminal Procedure 3.01. Indeed, the initial complaint filed against Respondent was less than four pages in length. The arrest warrant process, under Minnesota law, is virtually identical to the procedure involved in obtaining a search warrant. See *State* v. *Merrill*, 274 N.W. 2d 99 (Minn. 1987), *State* v. *LeBarre*, 292 Minn. 228, 295 N.W. 2d 435 (1972). On Saturday, police were able to secure a search warrant for a vehicle involved in their investigation within two and one-half hours. As yet, police authorities have been unable to adequately

explain why procuring an arrest warrant one day later was more difficult.

Detective DeConcini was scarcely in a position to explain why an arrest warrant could not be procured, since he had never before sought one during a weekend. Nonetheless, the Petitioner's Brief blithely contends "it is clear a warrant could not have been obtained quickly . . ." In fact, Detective DeConcini testified, on cross examination:

Q. Officer, I assume in the course of your 20 years as a police officer you have secured arrest warrants and arrested individuals based on warrants. Is that correct?

A. Yes, I have.

Q. Are you aware that when this process is followed that a Judge actually has to physically review the warrant and determine if it is proper to arrest somebody. Is that correct?

A. That is correct.

Q. And approximately how long—if there is some urgency involved the process can be expedited, can't it?

A. Yes and no.

Q. Well, you could secure one within a couple of hours, under normal circumstances, couldn't you?

A. Under normal circumstances, Monday through Friday from 8:00 a.m. to 4:00 p.m., yes.

Q. Have you ever secured an arrest warrant on a weekend?

A. No.

Q. Have you ever tried?

A. No.

(RHT. 129-130).

Detective DeConcini never indicated at any point in his testimony that the time required to obtain an arrest warrant entered into his decision. The only distinction between arrest and search warrants in Minnesota appears to be the County Attorney's active participation in the warrant application process. Detective DeConcini explained that he did not wish to disturb prosecutors during their vacation time. These excuses were, understandably not warmly received by the Minnesota Supreme Court. They should be similarly rebuffed by this tribunal.

Petitioner is unable to identify any danger to the public prevented by Respondent's warrantless arrest. Although Petitioner desperately attempts to persuade this Court that some urgent need justified Respondent's warrantless arrest those efforts have a singularly hollow cast.

First, the State notes the gravity of the offense involved as sanction for Respondent's warrantless arrest. (Petitioner's Brief, p. 26). The seriousness of the charge against Respondent is not disputed. However, while the gravity of a particular offense may be an underlying consideration, *Welsh* v. *Wisconsin*, 466 U.S. at 753, the seriousness of a particular crime does not alone create an exigency. In *Payton* v. *New York*, this Court deemed the accused's arrest "routine", notwithstanding the equally serious nature of the charges leveled against Payton. 445 U.S. at 583.

Second, Petitioner argues "Police had reason to believe Respondent might be armed . . ." (Petitioner's Brief, p. 26). This conjectural supposition is without basis. The murder weapon was recovered shortly after the robbery. When Mr. Olson fled he was observed to be unarmed.

Even the fictitious tipster did not allege that Mr. Olson possessed a firearm. Not surprisingly, at the time of his arrest, Respondent was unarmed. The State casually dismisses this troubling information as unimportant. (Petitioner's Brief, p. 26).

Third, the State argues that "police had reason to believe Respondent may be preparing to flee . . ." Again, this is a demonstratively meritless conclusion. It is underpinned by two extraordinarily weak pillars. Initially the State argues that police concluded Respondent intended to flee because they had "received information that he might flee . . ." (Petitioner's Brief, p. 27). This information came from Detective DeConcini's fictitious tipster. As the Minnesota Supreme Court noted, this information proved unfounded even before Respondent's arrest. Respondent had not left town but "had returned to the duplex where he had stayed the previous night." (J.A. 23).

The Petitioner also contends police reasonably believed Respondent would attempt escape because "Respondent's statement to Julie Bergstrom "tell them I left" could be reasonably construed . . . as a statement of . . . present intent to flee . . ." (Petitioner's Brief, p. 27). Unfortunately, there is no evidence that Respondent ever instructed Julie Bergstrom to mislead police regarding his location.[21] Julie Bergstrom expressly denied hearing

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[21] Julie Bergstrom, the individual at the other end of the telephone line, contradicted Detective DeConcini's version of the telephone conversation in which the detective asserts hearing the male background voice. Ms. Bergstrom testified:

Q. Did you have a telephone conversation with Sgt. DeConcini?
A. I did have a conversation with an officer that day *after the police were already in my house*(emphasis supplied).
Q. Did he instruct you or ask you to send Rob Olson outside?
A. Yes.
Q. Did you tell Mr. Olson that?
A. No . . . I don't even know where he was at the time . . . when the police came in I had no idea where he was (T. 543)

Respondent make any such statement (T. 543). Ms. Bergstrom added that the telephone call from Detective DeConcini occurred only after police entered the home to arrest Mr. Olson and that she was unaware of Respondent's location at the time (T. 543). Even Detective DeConcini acknowledged that he could not identify the voice he assertedly overheard (T. 434). Even if true, there is no judicial authority for the proposition that a criminal suspect's unwillingness to voluntarily surrender himself to police constitutes an exigent circumstance. The Minnesota Supreme Court specifically dealt with this concern in its opinion noting "three or four Minneapolis police cars surrounded the house." The Court then added, "It was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended." (J.A. 23-24).

2. The *Dorman* Analysis Is An Appropriate Starting Point To Comprehensively Articulate The Factors Which Bear Upon The Existence Of Exigent Circumstances And The Minnesota Supreme Court Fairly Concluded No Exigency Existed Under The *Dorman* Standards.

In *Dorman* v. *United States*, 435 F2d 385 (D. C. Cir. 1970) (en banc) Circuit Judge Leventhal attempted to substantively analyze the factors pertinent to the exigent circumstances issue. The Court outlined six considerations: (1) the gravity of the offense, (2) whether the suspect is reasonably believed armed, (3) whether "there exists not merely the minimum of probable cause . . . but beyond that a clear showing of probable cause, including reasonably trustworthy information to believe that the suspect committed the crime . . .", (4) whether the police have strong reason to believe the suspect is in the premises about to be entered, (5) likelihood of escape, (6) forcefulness involved in the entry. Id. at 392-393.

In *Welsh* v. *Wisconsin*, this Court characterized *Dorman* as "a leading federal case defining exigent circumstances" but declined to express approval of "all the factors included in the standard." 466 U.S. at 751. All parties acknowledge that *Dorman* has been widely followed (see Solicitor General's Brief, p. 21, n. 11). However, Petitioner argues that the *Dorman* analysis is "impractical, inflexible and outdated." (Petitioner's Brief, p. 29).

Presumably, the prosecution's objection to the *Dorman* analysis is that its considerations generally support the Minnesota Supreme Court's determination. Admittedly, police sought Respondent for a serious offense. However, police had no valid reason to believe Respondent was armed, the evidence underpinning the police probable cause determination came from uncorroborated and uninvestigated information provided by a fictitious tipster, there was no conceivable likelihood Respondent would flee, and the police entry into the home at 2406 Fillmore was accomplished in a threatening and offensive manner. (RHT. 184-185, 198. For a detailed explanation see Respondent's Brief in Opposition, p. 15 n. 13.)

It is not certain that additional instruction is required from this Court to guide lower Courts in making similar determinations. However, if this Court chooses to adopt a more comprehensive series of standards than previously articulated, Respondent suggests that the *Dorman* factors, with some modification, present an appropriate starting point. Respondent submits that the following constitute appropriate criteria: (1) gravity of the offense involved, (2) whether police have a reasonable belief that a suspect is armed and presents an immediate danger to the community, (3) whether the police possess, at the time they choose to make an arrest without judicial guidance, a clear showing of probable cause based on reasonably trustworthy information, (4) whether there is a reason-

able likelihood the suspect will successfully flee if not swiftly apprehended, (5) were the police, in the absence of an arrest warrant, required to use force to effect the suspect's arrest.[22]

C. Petitioner's Attempt To Redefine Exigent Circumstances Will, In Application, Bring Virtually Any Felony Arrest Within Its Parameters And Emasculate *Payton* v. *New York*.

Petitioner proposes the *Dorman* analysis be recast by this Court to warrant "a finding of exigency where police have probable cause,[23] knowledge of the suspect's whereabouts, and facts indicating the suspect is dangerous and about to flee" (Petitioner's Brief, p. 31). This characterization effectively strips away much of the protection assured under *Payton*. Both *Payton* and *Olson* were suspects in murder investigations. Moreover, the suspect in *Payton* was believed to have actually committed the murder, the weapon had not been recovered, and police reasonably believed Payton to be present when his arrest was sought.

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[22] Certainly if the police can point to an emergency condition already explicitly recognized by this Court such as "hot pursuit" or possible destruction of evidence that warrantless arrest would be justified. These standards will be utilized only when police claim an urgent need to make an arrest in circumstances not universally recognized as "exigent".

[23] Respondent raised several issues on appeal to the Minnesota Supreme Court. Included in Respondent's appeal to the Minnesota Supreme Court was a challenge to the trial court's probable cause determination. Respondent also claimed his arrest was violative of both the United States and Minnesota Constitutions. The Minnesota Supreme Court did not determine the probable cause issue nor the validity of Respondent's arrest under the Minnesota Constitution. Accordingly, even if this Court reverses the Minnesota Supreme Court's February, 1989 decision, this action must be remanded to the Minnesota Supreme Court for determination of the remaining appeal issues raised by Respondent in that forum.

445 U.S. at 583. Payton's arrest, as Respondent's, was sought within a few days of the offense. Id at 576. Under these circumstances, this Court did not hesitate to characterize Payton's arrest for murder as "routine" and not involving any exigency. Id. at 583.

Yet, precisely the opposite result might occur if this Court redefines exigency as requested by Petitioner.[24] Using hindsight, police officers will be invited to find an emergency behind almost every felony arrest. Felony suspects, by definition, are believed to have committed serious offenses. Under Petitioner's expression of exigency, once police simply locate a felony suspect they are virtually guaranteed the right to make a warrantless arrest. All the police must prove is that the "suspect is dangerous and about to flee." Presumably, police will, as in this instance, bootstrap from the gravity of the offense to the conclusion that the suspect is dangerous. From there, police must only believe that the suspect is "about to flee".

Police will invariably conclude that a suspect is about to flee if, as Respondent, he refuses to voluntarily surrender himself to police in the absence of a warrant. (See Petitioner's Brief, p. 27). This standard strikes at the very heart of the Fourth Amendment. In *Payton*, this Court characterized the Fourth Amendment as "unequivocally"

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[24] Respondent submits that even if Petitioner's test is adopted Mr. Olson's arrest remains invalid. Although the crime involved was a grave one, the police have, as yet, been notably unable to articulate any reasonable basis to believe that Respondent was either dangerous to those around him or about to flee. *See* pages 35 through 38 *supra*. Certainly any danger to the public would not have been increased had police at least attempted to obtain judicial sanction for Respondent's arrest. Such approbation would have been particularly appropriate in light of the great uncertainty underlying Detective DeConcini's probable cause determination.

supporting the proposition that an individual may retreat into his dwelling and there be free from government seizure of his person unless accompanied by a warrant. 445 U.S. at 590. Yet Petitioner now asks the Court to emasculate that protection by finding, on the simplest pretext, that an exigency occurred. This will certainly do an injustice to Respondent. It will also create a rippling effect throughout this country's Courts as one tribunal after another is compelled to grant police virtually unfettered felony arrest authority under the nebulous standard enunciated by Petitioner.

In a feeble attempt to justify the storming of Respondent's temporary dwelling, Petitioner argues that the police invasion of the home was preferable to a stake-out which could have endangered the community. Petitioner cites a plethora of cases for the proposition that a "stake-out" is not required in preference to a warrantless arrest (Petitioner's Brief, p. 32). This argument might seem superficially compelling if viewed in isolation. The specific circumstances of Respondent's arrest, however, indicate that if any danger was posed it stemmed from the deliberate action of police authorities and not as a result of Respondent's conduct.

Petitioner's argument that a warrantless arrest is preferable to a lengthy stakeout is intrinsically flawed because it simply assumes that obtaining a warrant would have delayed Respondent's arrest. There is no evidence that this is true. Certainly police were able to obtain a search warrant in a brief time only twenty-four hours earlier. In this case, the Court has absolutely no idea how long procuring an arrest warrant would have taken to obtain, since police made no attempt to garner one. Officer DeConcini did testify that a warrant can be obtained within a few hours on a week day (RHT. 130). Officer VonLehe testified that he was sent to Respondent's temporary residence by Detective DeConcini at approximately 1:00 P.M. Sunday with instructions to arrest Mr. Olson (RHT. 142). Respondent was not present, he did not return to the house until a few hours later, and his arrest was not accomplished until approximately 3:00 P.M. Under these circumstances it is altogether possible that if police had made some degree of minimal effort that they might have procured an arrest warrant—or risked its denial—and effected Mr. Olson's arrest just as promptly.[25]

Petitioner and its Amicus colleagues suggest that a stake-out was inappropriate here and that an exigency occurs "whenever a suspect implicated in a violent crime or thought to be armed discovers he has been cornered by the police." Solicitor General's Brief, p. 24, Petitioner's Brief, p. 31, Amicus Brief, p. 24). This characterization ignores the crucial role played by police in contributing to

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[25] One commentator has suggested that Courts distinguish between "planned" and relatively spontaneous arrest decisions. 2 W. LaFave, *Search and Seizure*, Section 6.1(f) 600-602 (1987). Petitioner suggests that concept offers a means of distinguishing this action from *Payton* (petitioner's Brief, P. 35). This claim is without merit. The factual circumstances of *Payton* and this case are substantially similar. In *Payton*, police made their decision to arrest Payton "after two days of intensive investigation . . ." and attempted to do so at his residence within a few hours. 445 U.S. at 576. Here, police made their decision to arrest Olson after approximately one and one-half days investigation and chose to do so at his temporary residence. How Payton's arrest can be characterized as a "planned" arrest while Respondent's was "not truly a planned arrest" is puzzling. Petitioner suggests that Respondent's arrest was different than Payton's because Sgt. DeConcini would have arrested Respondent anywhere he found him (Petitioner's Brief, P. 35). Presumably, New York police would have arrested Mr. Payton anywhere they found him. The simple fact remains that both New York and Minneapolis police officers focused their arrest efforts at a dwelling.

the "exigency" purportedly justifying Respondent's arrest. Respondent had no personal knowledge that he was sought by police, nor was he aware that police intended to direct his arrest at the home at 2406 Fillmore. Although the chronology of events is disputed, Officer DeConcini testified that he alerted Respondent to police intentions by attempting to telephone him at the Bergstrom home and demanding his immediate surrender (T. 433-434).

Petitioner now contends that an exigency was thereby created because:

> Respondent, who knew he was involved in a robbery and murder and that the police were outside, may well have become desperate to escape. The stake-out would give him time to explore his options, including an armed shootout with the police or the taking of a hostage from within. A desperate Respondent may well have turned on his acquaintances. . ."

(Petitioner's Brief, p. 31).[26] Even assuming these concerns were valid, they were all prompted by deliberate police conduct. Rather than simply attempting to secure an arrest warrant and undertaking Mr. Olson's arrest with judicial approval, police chose to escalate the situation and then used Respondent's unwillingness to voluntarily surrender as an excuse for his warrantless seizure.

Prior decisions of this Court strongly imply that police should not be allowed to profit from the artificial creation

[26] The factual underpinnings for this conjecture are woefully inadequate. An escape would have been fruitless, since the house was surrounded. Certainly it would have been difficult for Mr. Olson to enter into a shoot-out with the police when he was unarmed. The occupants of the Bergstrom home did not feel threatened—he was their guest. Rather, their only hostages taken at the time of Mr. Olson's arrest were Julie Bergstrom and her mother, LouAnn, who were seized and mistreated by police officers (RHT. 184-200).

of exigent circumstances. This Court has held that failure to obtain a warrant when reasonable time and opportunity existed to do so invalidated a warrantless arrest even though the arrest was accompanied by an apparent exigency. *McDonald* v. *United States*, 335 U.S. 451, 454-456 (1948).[27] Similarly, Respondent submits that this Court should conclude that unless police can evidence, from the outset, that securing an arrest warrant will endanger the public, that police cannot then use their own subsequent actions creating an exigency, as a basis for dispensing with mandated warrant requirements.[28]

[27] Later this Court held that the test was not necessarily whether it was reasonable to procure a warrant, but whether, under the circumstances, the search and seizure were reasonable. *United States* v. *Rabinowitz*, 339 U.S. 56 (1950). Because the police had obtained a warrant for the suspect's arrest and because the search was made incident to that arrest, this Court sanctioned the seizure as reasonable even though police could have independently obtained a separate search warrant. In *Katz*, this Court noted that whenever a practicable police should obtain prior judicial approval of searches and seizures through the warrant process 389 U.S. at 357.

[28] At least one lower Court has concluded that a premature confrontation between a suspect and police can artificially create exigent circumstances that will not justify a warrantless search. *State* v. *Kelgard*, 40 Or. App. 205, 594 P. 2d 1271 (1979).

CONCLUSION

The February, 1989 determination of the Minnesota Supreme Court is well-reasoned and consistent with the path of Fourth Amendment analysis directed by this Court. It should be affirmed.

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Respectfully submitted,

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